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12 *Pro Hac Vice Applications To Be Submitted*

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21 **BODOG ENTERTAINMENT GROUP S.A.**, and erroneously

22 named Specially Appearing Defendants **BODOG.NET** and

23 **BODOG.COM**

24 **UNITED STATES DISTRICT COURT**

25 **DISTRICT OF NEVADA**

26 **1ST TECHNOLOGY LLC,**

27 Plaintiff,

28 vs.

29 **RATIONAL ENTERPRISES LTDA.,**  
30 **RATIONAL POKER SCHOOL LIMITED,**  
31 **BODOG ENTERTAINMENT GROUP S.A.,**  
32 **BODOG.NET, BODOG.COM, AND**  
33 **FUTUREBET SYSTEMS LTD.,**

34 Defendants.

Case No: 2:06-cv-1110-RLH-GWF

**SPECIALLY APPEARING DEFENDANTS**  
**BODOG ENTERTAINMENT GROUP S.A.**  
**AND ERRONEOUSLY NAMED**  
**SPECIALLY APPEARING DEFENDANTS**  
**BODOG.NET AND BODOG.COM'S**  
**REPLY TO PLAINTIFF'S OPPOSITION**  
**TO DEFENDANTS' MOTION TO SET**  
**ASIDE DEFAULT JUDGMENT;**  
**MEMORANDUM OF POINTS AND**  
**AUTHORITIES IN SUPPORT THEREOF**

Date: October 11, 2007

Time/Dept.: 9:00a.m., Rm. 6C

1 **I. I. INTRODUCTION**

2 Specially appearing Defendants Bodog Entertainment Group S.A.,<sup>1</sup> Bodog.net, and  
3 Bodog.com, (collectively “Defendants”)<sup>2</sup> challenge jurisdiction and Reply to Plaintiff’s  
4 Opposition to the Motion to Set Aside the Default Judgment.

5 Plaintiff’s Opposition papers establish that both parties agree that a default and default  
6 judgment may be set aside for good cause when: (1) there is an adequate explanation for why the  
7 default was entered improperly; (2) the opposing party will not be unfairly prejudiced; (3) when  
8 meritorious defenses exist; or (4) the amount of money involved so warrants. (Opp. 7:23-8:8).  
9 Defendants satisfy all of these factors.

10 First, there are a number of explanations as to why the default was entered improperly.  
11 Plaintiff did not properly serve the complaint. Plaintiff acknowledges that proper service in  
12 Costa Rica requires the server to obtain the signature of the individual served or provide an  
13 explanation of why the signature was not obtained. Plaintiff failed to provide the required  
14 signature or explanation. Neither did Plaintiff adequately inform counsel of the suit. Further,  
15 even if the summons and complaint could be deemed served, this Court does not have  
16 jurisdiction over Defendants.

17 Second, Plaintiff cannot establish that it would be unfairly prejudiced if the case were to  
18 proceed on the merits.

19 Third, Defendants have meritorious defenses. The only claim identified by Plaintiff in  
20 the complaint as being infringed is poorly drafted and appears impossible for Defendants to  
21 infringe.

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23  
24  
25 <sup>1</sup> Referred to herein as Bodog Entertainment or Bodog Entertainment Group, S.A.

26 <sup>2</sup> Improperly named Bodog.com and Bodog.net are not entities. They are merely domain  
27 names and the Court has no in rem jurisdiction over them because they are not registered in  
28 Nevada.

Fourth, the default judgment in this case involves an enormous amount of money – over \$40 Million. Under the circumstances, it would be unfair to allow Plaintiff to attempt to proceed on a default judgment of over \$40 Million and the default judgment should be set aside.

In light of these and other reasons previously set forth in Defendants’ motion, Defendants respectfully asks that this Court set aside the default judgment entered in this action.

## **II. THE DEFAULT JUDGMENT SHOULD BE SET ASIDE**

### **A. There Are Numerous Explanations As To Why The Default Was Entered Improperly**

#### **1. Plaintiff’s Evidence Confirms that Defendants Were Not Properly Served**

*a. Costa Rican law requires that the served party sign the affidavit of service*

By its own evidence, Plaintiff confirms that its attempted service of process on the Defendants was defective. The translated excerpt of Article 7 of the Service Laws of Costa Rica supplied by Plaintiff in its opposition papers proves that Plaintiff’s attempted service on the Defendants did not comply with the Service Laws of Costa Rica. (See Opp., Ex. 11 at Ex. B). While Plaintiff would like the Court to believe that service on a corporation in Costa Rica is effective by merely serving “any person that appears to be older than fifteen years old who is present where service should be effected,” the laws of Costa Rica require more. (See Opp., Ex. 11, ¶ 4) Namely, Article 7 further requires:

The delivery will be recorded together with the name of the person who received the copies of the summons, who will sign next to the Process Server that performed the service. If the person who received the service does not know how, does not want or cannot sign, then Server is responsible to record this situation. (Opp., Ex. 11 at Ex. B).

In the present case, the affidavits of Allan Vargas (the “Vargas Declaration”), the process server who allegedly served Ana Victoria Mora Flores (“Ms. Mora”) with the Complaint in this action, do not contain the signature of Ms. Mora or any other person. (See Opp., Ex. 5). To that

end, Plaintiff does not allege that Ms. Mora could not or would not accept service on behalf of the Defendants. To the contrary, Plaintiff alleges that Ms. Mora “represented to the process server that she was in charge;” however, Mr. Vargas did not seek more clarity as to Ms. Mora’s title or authority to accept service on behalf of the Defendants, and more importantly, did not require Ms. Mora to sign the affidavits. (See Opp., Ex. 5). It is clear from the evidence that Defendants were not properly served in this action. Even if Plaintiff were to argue, which Plaintiff does not, that Ms. Mora failed to cooperate with the process server, Mr. Vargas would have been required to “record the situation.” (See Opp., Ex. 11 at Ex. B). However, Plaintiff has no explanation for Mr. Vargas’ failure to obtain the signature of the person who allegedly accepted service on behalf of the Defendants. Plaintiff has no explanation because Ms. Mora was not served.

As such, the evidence presented by Plaintiff affirms that Plaintiff’s attempted service on the Defendants did not comply with the Service Laws of Costa Rica, as required under Rule 4.

*b. The evidence makes clear that Ms. Mora was never served*

The evidence presented by both parties establish that: (1) Ms. Mora stated (under oath) that she was never served with the Complaint in this action; (2) the affidavits of service of process presented by Plaintiff (i.e., the Vargas Declarations) are defective under the service laws of Costa Rica because they do not contain (a) the signature of the person allegedly served with the process, or (b) an explanation why such signature was not obtained by the process server; (3) the description of the person allegedly served with the Complaint (according to the Vargas Declarations) does not match the description of Ms. Mora; and (4) had Ms. Mora accepted service of the Complaint in this action, she would have been required to obtain management approval before accepting service. Based on this evidence, it is clear that Ms. Mora was never served in this action.<sup>3</sup> Plaintiff merely relies on the self-serving declaration Mr. Vargas to

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<sup>3</sup> In its opposition, Plaintiff submits a document that states that Ms. Mora was a “fiscal” of Bodog Entertainment; this document does not prove that Ms. Mora was not an administrative assistant and it certainly does not prove that she had any authority to accept service on behalf of

1 establish that Ms. Mora was served. However, Plaintiff has not provided an explanation for its  
2 failure to obtain the signature of the person who allegedly accepted service on behalf of the  
3 Defendants in this action.

4 Turning now to the Vargas Declaration, Plaintiff even admits that the Vargas Declaration  
5 was vague and describes the person allegedly served as being 38 years of age and weighing  
6 “80”;<sup>4</sup> the affidavit conveniently fails to specify the person’s weight in pounds or kilograms.  
7 (See Opp., p. 10, n. 3; Ex. 5 and 6). The evidence clearly establishes that Ms. Mora was 27 years  
8 of age and weighed approximately 150 pounds (or approximately 68 kilograms) at the time of  
9 the attempted service. (See Mora Decl. ¶ 4). Indeed, Ms. Mora’s Costa Rican identification card  
10 proves that Ms. Mora is currently 28 years of age (i.e., she was born in 1979) and does not look  
11 like a nearly 40 year old woman. (See Mora Decl. ¶ 4, Ex. A). In the same way, there is a  
12 noticeable difference in the physical appearance of a person weighing 150 pounds, from a person  
13 weighing 175 pounds; this is a 25 pounds difference. Thus, the most plausible explanation for  
14 the obvious discrepancy in the description of Ms. Mora is that she was never served by Mr.  
15 Vargas and he either (1) tried to effect service on a receptionist who may have identified Ms.  
16 Mora as being “in charge” of office support, or (2) simply listed the characteristics in which he  
17 believed the average Costa Rican office supervisor possessed.

18 Lastly, in its opposition, Plaintiff cites several cases to support its claim that service on  
19 the administrative staff of a corporation is adequate. However, these cases are not applicable  
20 here because: (1) the parties did not dispute that a staff member was served; (2) there was  
21 evidence that the staff member told the process server that it could accept service on behalf of  
22

23 Bodog Entertainment. To the contrary, Plaintiff has not presented any evidence that proves that  
24 Ms. Mora had proper authority to accept service on behalf of Bodog Entertainment, and even if  
25 Plaintiff had such evidence, this fact would not cure Plaintiff’s defective service on the  
26 Defendants.

26 <sup>4</sup> Plaintiff argues that Costa Rica follows the metric system so the weight of “80” was  
27 intended to mean 80 kilograms. However, the process server does not describe the height of the  
28 person allegedly served in meters, but in the English system (i.e., inches).

the corporation; and (3) after serving the staff member, the plaintiff mailed a copy of the summons and complaint to an officer of the corporation.<sup>5</sup> To the contrary, in the present action: (1) Defendants refute that Ms. Mora was served with the Complaint; (2) Ms. Mora did not have proper authority to accept service for Bodog Entertainment, so she would not have told Mr. Vargas that she could accept service on behalf of Bodog Entertainment; and (3) after its attempted service, Plaintiff provides no evidence that it attempted to mail a copy of the complaint to the Defendants' corporate offices.<sup>6</sup> Thus, the authority cited by Plaintiff is not persuasive.

## 2. This Court Lacks General or Specific Jurisdiction Over the Defendants

For a court to exercise in personam jurisdiction over a defendant, two things must occur. First, the defendant must be served with process sufficient to give notice that a court is seeking to assert personal jurisdiction over it, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314–16 (1950), and, second, the plaintiff must show that the defendant has sufficiently meaningful contacts with the forum state that a court's assertion of jurisdiction over the defendant does not offend fundamental notions of fairness or due process. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (due process clause protects corporation from "being subject to the binding judgments of a forum with which it has established no meaningful 'contacts, ties, or relations.'"). Plaintiff's purported assertion of jurisdiction over Defendants here fails on both counts. As established above, Defendants were not properly served in this

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<sup>5</sup> In fact, and consistent with Plaintiff's practice of misstating the law, in one of the cases cited by Plaintiff, Battie v. Freeman Decorating, 2001 WL 1345927 (E.D. La 2001), the court actually found that plaintiff's attempted service of a summons on the front desk of a company was ineffective.

<sup>6</sup> Plaintiff's counsel claims that he spoke to, and left his contact information with, an anonymous "Bodog supervisor" prior to Plaintiff's attempted service of the Complaint. (See Opp., Ex. 8). It would have been prudent for Plaintiff's counsel to (1) have gotten the supervisor's name and contact information, and (2) follow-up with that supervisor, or mail the Complaint to the supervisor after the Complaint was served to ensure that service was effective.

1 action. In addition to Plaintiff's failed service, this Court lacks general and specific jurisdiction  
2 over the Defendants.

3 *a. This court lacks general in personam jurisdiction over defendants*

4 Plaintiff bears the burden of both adequately alleging and proving personal jurisdiction  
5 over Defendants. Trump v. District Court, 857 P.2d 740, 748 (Nev. 1993) (holding that plaintiff  
6 bears burden of producing some evidence in support of all facts necessary to establish personal  
7 jurisdiction). Plaintiff cannot seriously contend that the Court has general jurisdiction over  
8 Defendants. A court cannot exercise general jurisdiction over a non-resident defendant unless  
9 the defendant's forum activities are so "substantial or continuous and systematic" that it may be  
10 deemed present in the forum." Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S.  
11 408, 416 (1984); Freeman v. District Court, 1 P.3d 963, 965 (Nev. 2000) (citing Budget Rent-A-  
12 Car v. District Court, 835 P.2d 17, 19 (Nev. 1992)).

13 Plaintiff has not shown that Defendants have extensive in-state contacts with Nevada or  
14 that they conduct any activities within the state – let alone substantial and continuous activities.<sup>7</sup>  
15 Dole Food Co., Inc. v. Watts, 303 F.3d 1104, 1108 (9th Cir. 2002) ("Where a defendant brings a  
16 motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of  
17 demonstrating that jurisdiction is appropriate."); Amba Mktg. Sys. Inc. v. Jobar Int'l Inc., 551  
18 F.2d 784, 787 (9th Cir. 1977) (stating that plaintiff cannot "simply rest on the bare allegations of  
19 its complaint . . ."). Plaintiff has not met its burden and this Court has no general in personam  
20 jurisdiction over Defendant.

21 *b. This court lacks specific in personam jurisdiction over defendants*

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23  
24 <sup>7</sup> This is so because Bodog Entertainment Group, S.A. does not itself provide online  
25 entertainment services. It merely provided technical services, including domain name  
26 management, for various entities, including but not limited to entities that use the BODOG mark  
27 and variations thereof to provide various online entertainment services. Further, Bodog  
28 Entertainment does not operate any websites; it merely administered domain names, including  
erroneously named defendants bodog.com and bodog.net, for other businesses.

1 Under Nevada law, specific jurisdiction is appropriate only where “the cause of action  
 2 arises from the defendant’s contacts with the forum.” Zuffa, LLC v. Showtime Networks, Inc.,  
 3 2007 U.S. Dist. LEXIS 60711, at \*21 (D. Nev. 2007); Price and Sons v. District Court, 831 P.2d  
 4 600, 602 (Nev. 1992). Exercise of specific jurisdiction is only appropriate if the Due Process  
 5 Clause is satisfied and the defendant’s activities fall within those activities enumerated in  
 6 Nevada’s long-arm statute.<sup>8</sup> See Trump, 857 P.2d at 748. Here, the exercise of specific  
 7 jurisdiction is improper because Plaintiff has not alleged, nor can it prove, that Defendants have  
 8 purposefully availed themselves of the benefits and protections of Nevada law.

9 This Court should not grant Plaintiff’s requested injunction because Defendants have no  
 10 meaningful contacts with the State of Nevada. The Due Process Clause protects a corporation  
 11 from “being subject to the binding judgments of a forum with which [it] has established no  
 12 meaningful ‘contacts, ties, or relations.’” Burger King Corp., 471 U.S. at 472 (citing  
 13 International Shoe Co. v. Washington, 362 U.S. 310, 319 (1945)). The Constitution requires  
 14 meaningful contacts to ensure that a corporation can predictably determine when its conduct in a  
 15 state rises to the level that it “should reasonably anticipate being haled into court there.” World-  
 16 Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). These requirements are not  
 17 met unless the defendant has “purposefully availed” itself of “the benefits and protections of [the  
 18 forum state’s] laws.” Hanson v. Denckla, 357 U.S. 235, 253 (1958). This occurs when a foreign  
 19 corporation “creat[es] continuing relationships and obligations with citizens of another state.”  
 20 Travelers Health Assn. v. Virginia, 339 U.S. 643, 647 (1950).

21 This Court has no specific jurisdiction over Defendants because they have not  
 22 purposefully availed themselves of the benefits and protections of Nevada laws. Plaintiff has not  
 23

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24 <sup>8</sup> Nevada’s long-arm statute provides six bases for the exercise of jurisdiction, none of  
 25 which are applicable here: See NRS § 14.065. This statute is meant to be coextensive with the  
 26 limits of federal due process inasmuch as it authorizes Nevada courts to exercise jurisdiction  
 27 “over a party to a civil action on any basis not inconsistent with . . . the Constitution of the  
 28 United States.” Id.

1 alleged any contacts, let alone any meaningful contacts. Having not cultivated any contacts with  
2 the State of Nevada, the Due Process Clause protects Defendants from being haled into Nevada's  
3 courts because Defendants could not have reasonably anticipated being subject to the State's  
4 jurisdiction.

5 As an initial matter, Bodog.com and Bodog.net are not entities. They are merely domain  
6 names, over which this Court has no personal jurisdiction. Nor could this Court have in rem  
7 jurisdiction over them because those domain names are not registered in the State of Nevada (but  
8 instead in the State of Washington).

9 As for the only named entity, Bodog Entertainment Group, S.A., the only conceivable  
10 basis upon which Plaintiff could argue that it has meaningful contacts with Nevada is through its  
11 registration of domain names and mere maintenance of websites that are accessible in Nevada.  
12 However, these contacts are insufficient for two reasons: First, courts that have been called on to  
13 consider the jurisdictional implications of domain-name registration have held that, at most, the  
14 registration of domain names within a state permits a court therein to exercise in rem jurisdiction  
15 over the domain names, not in personam jurisdiction over the out-of-state company. See  
16 America Online, Inc. v. AOL.org, 259 F. Supp. 2d 449, 451 (E.D. Va. 2003) (holding in rem  
17 jurisdiction is proper over domain name registered in jurisdiction but personal jurisdiction is  
18 improper where registrant has no other contacts with forum); Globalsantafe Corp. v.  
19 Globalsantafe.com, 250 F. Supp. 2d 610, 615 (E.D. Va. 2003) (same). However, these cases are  
20 inapplicable to the present case because Bodog Entertainment Group, S.A. did not register its  
21 domain names with Nevada registrars.

22 Second, there is no specific personal jurisdiction because internet sites using the BODOG  
23 trademark (and variations thereof) might be accessible by Nevada residents. Courts sometimes  
24 apply a sliding-scale to determine whether activity over the Internet permits an assertion of  
25 specific jurisdiction within a particular forum: "the likelihood that personal jurisdiction can be  
26 constitutionally exercised is directly proportionate to the nature and quality of commercial  
27 activity that an entity conducts over the Internet." Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952

1 F. Supp. 1119, 1124 (W.D. Pa. 1997) (outlining sliding-scale of Internet activity that ranges from  
2 “passive” to “interactive”). This argument fails in the instant case for several reasons.

3 First, the so-called “Zippo test” is inapplicable unless the Internet transactions being  
4 examined are themselves the basis of the cause of action. See Zuffa, 2007 U.S. Dist. LEXIS  
5 60711, at \*20 (“[S]pecific jurisdiction over a defendant may be established only where the cause  
6 of action arises from the defendant’s contacts with the forum.”). Plaintiff makes no allegation  
7 and offers no evidence regarding where the alleged infringement occurred or what transactions  
8 caused the alleged infringement. Its underlying complaint offers only the vague and conclusory  
9 assertions that Bodog Entertainment Group, S.A. “has previously and is presently making,  
10 using, selling, offering for sale, and/or importing into the United States, software products that  
11 infringe one or more claims” of its patent. (See Complaint at ¶ 7, Ex. 1). It makes the exact  
12 same allegations as to all Defendants and all are insufficient.

13 Second, Plaintiff makes no showing that Bodog Entertainment Group, S.A., the only  
14 legal entity before this Court, ran any internet entertainment or other websites at any of the  
15 disputed domain names that can be accessed in Nevada or otherwise directed advertising to  
16 Nevada residents. See Zuffa, 2007 U.S. Dist. LEXIS 60711; see also Digital Control, Inc. v.  
17 Boretronics, Inc., 161 F. Supp. 2d 1183, 1185 (W.D. Wash. 2001) (stating that unless website  
18 operator has chosen to “dive into a particular forum, the mere existence of a worldwide web site,  
19 regardless of whether the site is active or passive, is an insufficient basis on which to find that  
20 the advertiser has purposefully directed its activities at residents in the forum state.”). For  
21 example, in Zuffa, the Nevada court found that “the mere existence of an interactive website is  
22 insufficient to establish general jurisdiction in the absence of proof of continuous and systematic  
23 contact between the forum state and the website.” Zuffa, 2007 U.S. Dist. LEXIS 60711, at \*14.  
24 In the instant action, Plaintiff’s vague and conclusory allegations of patent infringement is not  
25 enough to establish the Court’s jurisdiction in this action. (See Complaint at ¶ 7, Ex. 1).  
26 Plaintiff must provide “evidence of the extent of [Defendants’] contacts through its website with  
27 the [Nevada].” *Id.*

1 In sum, the Due Process Clause forbids this Court from exercising specific jurisdiction  
 2 over any Defendant because Defendants have not purposefully availed themselves of the benefits  
 3 and protections of Nevada law. Having not cultivated any meaningful contacts in the State of  
 4 Nevada, Defendants had no obligation to reasonably anticipate being haled into Nevada's courts.  
 5 The scarcity of Bodog Entertainment Group, S.A.'s contacts with Nevada is illustrated by the  
 6 fact that its domain names (the Original Domain Names) were not even registered here and its  
 7 internet activities are unrelated to Plaintiff's underlying cause of action.

8 *c. This Court lacks in rem jurisdiction over the erroneously named*  
 9 *Defendants*

10 In addition to its lack of jurisdiction over Bodog Entertainment, the only entity in this  
 11 action, the Court lacks jurisdiction over the erroneously named defendants Bodog.com and  
 12 Bodog.net, which are domain names. In certain instances, a court may have in rem jurisdiction  
 13 over a domain names. Though it is not controlling, the Anticybersquatting Consumer Protection  
 14 Act, 15 U.S.C. § 1125(d)(2)(C)(i)-(ii), provides persuasive guidance regarding the jurisdiction in  
 15 which a domain name will subject its owner to in rem jurisdiction: "In an in rem action . . . a  
 16 domain name shall be deemed to have its situs in the judicial district in which (i) the domain  
 17 name registrar, registry, or other domain name authority or registered or assigned the domain  
 18 name is located; or (ii) documents sufficient to establish control and authority regarding the  
 19 disposition of the registration and use of the domain name are deposited with the court." The  
 20 ACPA thus strongly suggests an intent on the part of the United States Congress to treat domain  
 21 names as property existing in both the location of the registry, and the location of the registrar.  
 22 See Mattel v. Barbieclub.com, 310 F.3d 293, 302 (2<sup>nd</sup> Cir. 2002) ("it is the presence of the  
 23 domain name itself-the 'property that is the subject of the jurisdiction'-in the judicial district in  
 24 which the registry or registrar is located that anchors the in rem action and satisfies due process  
 25 and international comity."); Office Depot, Inc. v. Zuccarini, 2007 WL 2688460, at \*3 (N.D. Cal.  
 26 2007) (an in rem civil action against a domain name in the judicial district in which the domain  
 27  
 28

1 name registrar, domain name registry, or other domain name authority that registered or assigned  
2 the domain name is located.)

3 Erroneously named defendants Bodog.com and Bodog.net have no connection  
4 whatsoever to the State of Nevada. Even if these domain names had a connection to the State of  
5 Nevada, Plaintiff would still need to establish that Defendants have cultivated the minimum  
6 contacts required under the Due Process Clause. See Shaffer v. Heitner, 433 U.S. 186, 206  
7 (1977) (extending minimum contacts requirement to exercises of in rem jurisdiction because  
8 “jurisdiction over a thing” is merely “an elliptical way of referring to jurisdiction over the  
9 interests of persons in a thing.”).

10 3. Plaintiff’s Lawyers Misrepresent the Record And Did Not Adequately  
11 Inform Counsel Before Entering Default

12 To bolster Plaintiff’s case, counsel for the Plaintiff misstates the record on several  
13 occasions concerning their communications with the Defendants’ counsel. In particular, such  
14 inaccuracies are reflected in, among others, (1) Plaintiff’s opposition brief, (2) the declaration of  
15 Plaintiff’s former counsel, Matthew McAndrews, and (3) the affidavit of Plaintiff’s counsel,  
16 Troy Mr. Wallin.

17 *a. Plaintiff’s Opposition Brief*

18 In its opposition brief, Plaintiff argues that its counsel had determined that  
19 Defendants’ counsel, Mr. Nguyen, “had previously represented Bodog in another patent  
20 litigation.” (Opp. 5:23-25). This is not correct. In 2006, Mr. Nguyen did previously  
21 represent certain defendants (including individuals) affiliated with various Bodog television  
22 entertainment businesses in a case filed in the Superior Court of California for the County of  
23 Los Angeles, but it was not a patent infringement lawsuit. (Nguyen Decl. ¶ 3). It instead  
24 related to an “idea submission” dispute over a reality television program. (Id.). Indeed, that  
25 prior case was in California state court, and could not as a matter of law involved patent  
26 claims, which are subject to exclusive federal court jurisdiction. (Id.).

27 *b. Mr. McAndrews’s Declaration*

1 Mr. McAndrews's affidavit states that in January 2007, he attempted to contact Mr.  
 2 Nguyen to discuss this action, but Mr. Nguyen told him that "he was not representing any of  
 3 the Bodog Entities in connection with the pending litigation, that he could not help me any  
 4 further at that time, and that he would contact me in the future if he were retained to represent  
 5 any of the Bodog Entities in connection with the pending litigation." (Opp., Ex. 7, ¶¶ 3-5).  
 6 Mr. Nguyen does recall getting a call from someone early in 2007 purporting to represent a  
 7 plaintiff in a patent lawsuit filed against a Bodog entity. (Nguyen Decl. ¶ 4). However, Mr.  
 8 Nguyen does not recall specifically if that person was Mr. McAndrews. (Id.). When Mr.  
 9 Nguyen spoke with that plaintiff's lawyer, Mr. Nguyen informed him that he was not  
 10 representing any Bodog entities in the patent lawsuit he referenced. (Id.). That was in fact  
 11 true at the time, because Mr. Nguyen and Foley & Lardner LLP had never previously done  
 12 any patent-related work for any Bodog business and had never previously defended any patent  
 13 litigation for any Bodog business. (Id.). Thus, at that time when Mr. Nguyen received a  
 14 telephone call about a patent lawsuit against certain Bodog entities, Mr. Nguyen did not  
 15 represent nor was he authorized or engaged to represent, any Bodog businesses in connection  
 16 with patent litigation. (Id.). Foley & Lardner and Mr. Nguyen have only begun to represent  
 17 Bodog Entertainment Group, S.A. in connection with this patent infringement litigation after  
 18 the Defendants recently learned about Plaintiff's efforts to execute on the default judgment  
 19 obtained in this case. (Id.).

20 *c. Mr. Wallin's Affidavit*

21 Mr. Wallin's affidavit, in particular, contains various inaccuracies. As an initial matter,  
 22 Defendants' counsel called Mr. Wallin on September 11, 2007 to discuss possible resolution of  
 23 this case. (Nguyen Decl. ¶ 5). Defendants' counsel specifically began the conversation by  
 24 telling Mr. Wallin that he wanted to discuss possible resolution, and asked him whether the  
 25 conversation would be treated as confidential pursuant to applicable settlement privileges. (Id.).  
 26 Mr. Wallin agreed. (Id.). Thus, all the of statements made to Mr. Wallin during the September  
 27 11 conversation were done in furtherance of settlement discussion. (Id.). The affidavits

1 submitted by Mr. Wallin to this Court purporting to summarize statements made during that  
2 conversation are in breach of the settlement privilege and the expectation of confidentiality  
3 Defendants' counsel had in his settlement conversation with Mr. Wallin.

4 Contrary to the statements made in paragraph 2 of Mr. Wallin's affidavit (See Opp.,  
5 Ex. 12, ¶ 2), Mr. Nguyen did **not** tell Mr. Wallin that "Bodog Entities intended to use their  
6 sovereign immunity [of the Mohawk Indians in Canada] as a shield to prevent Plaintiff from  
7 pursuing their claims in the instance litigation." (Nguyen Decl. ¶ 6). Mr. Nguyen merely told  
8 Mr. Wallin that the Bodog gaming business had recently announced (via a press release) that its  
9 North American gaming business was being licensed to the Morris Mohawk Gaming Group in  
10 Canada. (Id.). Such a license arrangement had been in the works for a long time and even  
11 members of the gaming media previously knew about it -- **before** the Bodog businesses learned  
12 of Plaintiff's default judgment and the seizure of numerous domain names. (Id.). Mr. Nguyen  
13 explained to Mr. Wallin that the Bodog gaming business would now be operated by the Morris  
14 Mohawk Gaming Group, that Plaintiff would ultimately have to litigate its patent claims with the  
15 Morris Mohawk Gaming Group (not with any Bodog entity), and that the Morris Mohawk  
16 Gaming Group was sovereign. (Id.). Mr. Wallin was never told that it was any of the Bodog  
17 Entities who intended to use the sovereign immunity of the Morris Mohawk Gaming Group to  
18 prevent Plaintiff from pursuing its claims. (Id.).

19 Similarly, the statements made in paragraph 4 of Mr. Wallin's declaration are also  
20 false. (See Opp., Ex. 12, ¶ 4). Mr. Nguyen did not tell Mr. Wallin that "Bodog believed it  
21 had already left U.S. jurisdiction by strategically aligning itself and/or joint venturing with the  
22 Mohawk Indians in Canada, thereby avoiding any possibility of collection." (Nguyen Decl.  
23 ¶ 7, Ex. 5). Defendants' counsel did not, and in fact would not, have made such a statement  
24 because – as is clear from Defendants' briefs in this case and in the Washington state court  
25 action initiated by Plaintiff to execute on its default judgment – Defendants are arguing that  
26 they are **not** and have not been subject to U.S. jurisdiction. (Id.). So it would not have made  
27 any sense for Defendants' counsel to say that Bodog "had already left U.S. jurisdiction" –

1 such as by entering into a deal with the Morris Mohawk Gaming Group -- and Nr. Nguyen  
 2 never made that statement. (Id.). Nor did Defendants' counsel ever state, as Mr. Wallin  
 3 implies, that any Bodog business entered into the license arrangement with the Morris  
 4 Mohawk Gaming Group for the purposes of "avoiding any possibility of collection." (Id.).  
 5 As explained above, Defendants' counsel told Mr. Wallin that the license arrangement with  
 6 the Morris Mohawk Gaming Group had already been in the works for some time before the  
 7 Bodog businesses became aware of Plaintiff's default judgment. (Id.).

8 **B. Plaintiff Would Suffer No Unfair Prejudice If The Case Proceeded On The**  
 9 **Merits**

10 As explained in McMillen v. J.C. Penney Co., Inc., 205 F.R.D. 557, 558 (D. Nev. 2002),  
 11 a default judgment should be set aside when a Plaintiff will not be unfairly prejudiced. Here,  
 12 Plaintiff will not be unfairly prejudiced if the case is litigated on its merits and Plaintiff has not  
 13 even tried to demonstrate evidentiary or financial prejudice. Plaintiff has not spent months of  
 14 time and hundreds of thousands of dollars preparing for trial. Plaintiff has not made any  
 15 showing that memories have faded or witnesses have died since the time the default was entered.  
 16 Especially given the exorbitant amount of the \$40+ Million default judgment Plaintiff sought,  
 17 the Plaintiff would receive an unwarranted windfall and Defendants would be unfairly prejudiced  
 18 if the default and default judgment were not set aside. Accordingly, the Court should grant the  
 19 motion to set aside the default and default judgment.

20 **C. Defendants Have Meritorious Defenses Against The Patent Infringement**  
 21 **Claim Warranting Setting Aside The Default Judgment**

22 Both parties acknowledge that the existence of a meritorious defense may warrant setting  
 23 aside a default judgment. (Mot. 10:6-10 citing Eitel v. McCool, 782 F.2d 1470, 1472 (9th Cir.  
 24 1986) and Opp. 7:23-8:8 citing Brand Scaffold Builders, Inc. v. Puerto Rican Electric Power,  
 25 364 F. Supp. 2d 50, 54 (D. Puerto Rico 2005)).

26 The only cause of action in this case is one for infringement of the '001 patent. A party  
 27 may only be liable for patent infringement if it violates 35 U.S.C. § 271. To be liable under § 271

1 a party must make, use, offer to sell, sell, or import a patented invention, or induce infringement  
 2 or contributorily infringe. As a threshold matter, the named Defendants do not provide any of  
 3 the online entertainment services Plaintiff contends infringe the '001 patent. Therefore, there is  
 4 no way that the named defendants could be liable for patent infringement.

5 Even if the named defendants did provide the online entertainment services complained  
 6 of by Plaintiff, they would still not infringe Plaintiff's strange patent. To establish patent  
 7 infringement, the patent owner must show that the accused infringer practices every element of  
 8 the asserted claim. Telemac Cellular Corp. v. Topp Telecom, Inc., 247 F.3d 1316, 1330 (Fed.  
 9 Cir. 2001). The only claim from its patent which Plaintiff specifically alleges in the complaint as  
 10 being infringed is claim 26. (See Complaint ¶ 17, Ex. 1). Claim 26, like most of the claims in the  
 11 '001 patent, requires two devices. The first is an "interactive multimedia mastering system."  
 12 (See '001 Patent, Ex. 2). Claim 26 also requires another device, referred to as an "interactive  
 13 media device." (Id.).

14 Although Plaintiff has never explained in this litigation how anyone could possibly  
 15 infringe this claim, presumably Plaintiff must believe that an entity provides both devices  
 16 claimed. "[L]iability for infringement requires a party to make, use, sell, or offer to sell the  
 17 patented invention, meaning the entire patented invention." See BMC Resources v. Paymentech,  
 18 L.P., Case No. 2006-1503 (Fed. Cir. Sep. 20, 2007) Slip Op. at 11, (finding no possible  
 19 infringement when the claims required the actions of multiple parties) (emphasis added) (Ex. 3).  
 20 See also Muniauction, Inc. v. Thomson Corporation, Case No. 2007-1485 at Slip Op. 2-3 (Fed.  
 21 Cir. Sep. 28, 2007) (explaining the legal standard for joint infringement) (Ex. 5). Plaintiff has  
 22 never explained how any named Defendant could possibly provide the "interactive media  
 23 device," which Plaintiff would presumably contend is a consumer's computer or some other  
 24 unidentified hardware.<sup>9</sup> Indeed, there has never been any allegation (let alone proof) that any

---

25  
 26 <sup>9</sup> Neither has Plaintiff explained how any named Defendant provides the "interactive  
 27 multimedia mastering system."

1 named Defendant provides any computers or other hardware to consumers and it appears that  
 2 Plaintiff would have no chance of proving infringement of claim 26 if the case were litigated on  
 3 the merits.

4 **D. The Enormous \$40+ Million Judgment Warrants Setting Aside The Default**  
 5 **Judgment**

6 As Plaintiff acknowledges, the amount of money involved may warrant setting aside a  
 7 default judgment. (Opp. 7:23-28). Here, the amount of money involved is enormous and more  
 8 than \$40 Million. \$40 Million is an huge award for a patent case or any type of case. See Seven  
 9 Elves, Inc. v. Eskenazi, 635 F.2d 396, 403 (5th Cir. 1981) (setting aside a default judgment for  
 10 \$250,000 because, among other things, the amount of the judgment was very great); ICE Co.  
 11 Production W.L.L. v. C & R Refrigeration, Inc., 2005 WL 1799517 at \* (E.D. Tex. 2005)  
 12 (setting aside a judgment for \$1.2 Million and that a sum that large weighed in favor of setting  
 13 aside the judgment). The amount of money at issue on this default judgment is much greater  
 14 than in other cases in which default judgments were set aside and the gigantic default judgment  
 15 in this case should not be allowed to stand when a defendant was not properly served, the Court  
 16 does not have jurisdiction, the Plaintiff would not be unfairly prejudiced if the case proceeded on  
 17 the merits, the defendant has meritorious defenses, or even if the defendant raises serious  
 18 questions on these issues. Here, Defendants have, at a minimum raised very serious concerns on  
 19 all of these issues and the default judgment should be set aside.

20 **E. Plaintiff's Unclean Hands Argument Has No Merit**

21 Plaintiff's unclean hands argument has no merit. In fact, Plaintiff's hands are not  
 22 unblemished and, for several reasons, Plaintiff has shown bad faith and unclean hands in this  
 23 action.

24 First, knowing that it did not properly serve the Defendants in this action, Plaintiff sought  
 25 and improperly obtained a default judgment against Defendants. Indeed, Plaintiff did not notify  
 26 Defendants of the default before it was entered against the Defendants in this action.

1 Second, as described above, Plaintiff's counsel has, on several occasions, misstated the  
 2 record in an attempt to justify Plaintiff's failure to inform Defendants of the default judgment  
 3 prior to its entry.

4 Third, Plaintiff's counsel has, on several occasions, misled this Court by citing improper  
 5 authority against Defendants. For example, in its improperly granted ex parte request for debtor  
 6 examination of Calvin Ayre in Nevada, Plaintiff misled the Court by asserting that NRS § 21.270  
 7 entitles a judgment creditor to seek a court order requiring a judgment debtor to appear for  
 8 examination "at any time and place specified in the order." (See Ex. 4). However, Defendants  
 9 properly explained in its emergency motion to vacate the order that NRS § 21.270 requires that  
 10 "[n]o judgment debtor may be required to appear outside the county in which he resides."<sup>10</sup> (See  
 11 Docket #43). Second, as discussed above, in its opposition, Plaintiff attempts to mislead the  
 12 court by asserting that the service laws of Costa Rica only require service of a person over 15  
 13 years of age who is present where service should be effected. However, as Defendants have  
 14 properly explained, proper service in Costa Rica requires the server to obtain the signature of the  
 15 individual served or provide an explanation of why the signature was not obtained. Plaintiff's  
 16 deceptive practice of misstating the record and improperly citing authorities in this case should  
 17 not go un-noticed, and should be considered in the Court's decision to lift the default judgment  
 18 in this action.<sup>11</sup>

#### 19 **F. Retroactively Approving Service Would Be Inappropriate**

20 Plaintiff's request that the Court retroactively approve service via alternative means  
 21 makes no sense for several reasons. First, this Court has no personal jurisdiction over  
 22 Defendants in this action. Second, this Court has already entered a final judgment in this action.

23  
 24  
 25 <sup>10</sup> This Court ultimately stayed Plaintiff's debtor request pending the outcome of  
 Defendants' motion to set aside default judgment. (See Docket #48).

26 <sup>11</sup> Plaintiff's contentions that Defendants are engaged in illegal gambling activities is  
 27 irrelevant to this motion, and in any event, Defendants do not operate the web sites at issue.

1 The cases cited by Plaintiff, Rio Properties and SCRA Corp.,<sup>12</sup> on this issue are factually  
 2 inapposite to this action. In these cases, service by alternative means under Rule 4(f)(3) was  
 3 ordered by the court prior to any final judgment. Plaintiff cites no authority authorizing a court  
 4 to retroactively approve service by alternative means to uphold a final judgment.

5 **G. A Bond is Not Needed**

6 Plaintiff's requested bond in this action is improper. Plaintiff seeks an enormous bond,  
 7 which would cover the entire judgment. As discussed in Defendants' objections to the  
 8 declaration of Dr. Lewis, the calculations Plaintiff used to determine the amount of damages are  
 9 improper and not based on any accepted methodology in violation of Daubert v. Merrel Dow  
 10 Pharms., Inc., 509 U.S. 579, 590 (1993). Specifically, Plaintiff failed to employ the accepted  
 11 methodology of analyzing the reasonable royalty factors set forth in Georgia-Pacific Corp. v.  
 12 United States Plywood Corp., 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970). Had Plaintiff bothered  
 13 to do so, Plaintiff surely could not have justified its requested judgment for \$40+ Million.

14 Plaintiff's request for a huge bond is also improper given that very little activity had  
 15 taken place in the case prior to the recent filings to set aside the default and default judgment.  
 16 Plaintiff could not have incurred significant attorneys' fees and no significant bond is warranted.

17 Further, Defendants are not a flight risk; they are not domiciled in the United States  
 18 and/or the State of Nevada. As the Court is well aware, Defendant Bodog Entertainment Group  
 19 S.A. is a Costa Rican company; Bodog Entertainment Group S.A. only held domain names with  
 20 the domain name registrar, Enom, Inc., located in the State of Washington. Erroneously named  
 21 Defendants Bodog.com and Bodog.net are not entities, rather, they are domain names. As  
 22 discussed above, this Court does not have jurisdiction over the domain names because the  
 23 domain names were not registered in Nevada.

24  
 25  
 26 <sup>12</sup> SCRA Corp. v. Trajes Internacionales de Costa Rica S.A., 1999 U.S. Dist. LEXIS  
 27 13708 (D. Pa. 1999).

1 Further, Plaintiff's bond request is flawed for at least two additional reasons. First,  
2 Bodog Entertainment Group S.A. does not operate "Bodog's" online entertainment business and  
3 simply could not provide the bond demanded by Plaintiff because Defendants simply do not have  
4 sufficient assets to post such a bond. Second, the instant action is not a criminal case where a  
5 Court may order a defendant to post a bond to prevent that person or entity from fleeing the  
6 Court's jurisdiction from a Court in which it has already established jurisdiction. This is a patent  
7 action, not a criminal prosecution and there is no justification for Plaintiff's outlandishly large  
8 bond request.

9 **III. CONCLUSION**

10 For all the foregoing reasons, the default judgment should be set aside.

11  
12  
13 Dated: October 1, 2007

Respectfully submitted,

14  
15 By: /s/ Charles McCrea

Charles McCrea

**LIONEL SAWYER & COLLINS**

16  
17 Attorneys for Specially Appearing Defendants  
18 **BODOG ENTERTAINMENT GROUP S.A.**, and  
19 erroneously named Specially Appearing Defendants  
20 **BODOG.NET** and **BODOG.COM**  
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**TABLE OF CONTENTS**

	<b><u>Page</u></b>
<b>I. I. INTRODUCTION .....</b>	<b>1</b>
<b>II. THE DEFAULT JUDGMENT SHOULD BE SET ASIDE.....</b>	<b>2</b>
A. There Are Numerous Explanations As To Why The Default Was Entered Improperly.....	2
1. Plaintiff's Evidence Confirms that Defendants Were Not Properly Served .....	2
a. Costa Rican law requires that the served party sign the affidavit of service .....	2
b. The evidence makes clear that Ms. Mora was never served.....	3
2. This Court Lacks General or Specific Jurisdiction Over the Defendants .....	5
a. This court lacks general in personam jurisdiction over defendants .....	6
b. This court lacks specific in personam jurisdiction over defendants .....	6
c. This Court lacks in rem jurisdiction over the erroneously named Defendants.....	10
3. Plaintiff's Lawyers Misrepresent the Record And Did Not Adequately Inform Counsel Before Entering Default .....	11
a. Plaintiff's Opposition Brief.....	11
b. Mr. McAndrews's Declaration .....	11
c. Mr. Wallin's Affidavit .....	12
B. Plaintiff Would Suffer No Unfair Prejudice If The Case Proceeded On The Merits .....	14
C. Defendants Have Meritorious Defenses Against The Patent Infringement Claim Warranting Setting Aside The Default Judgment .....	14
D. The Enormous \$40+ Million Judgment Warrants Setting Aside The Default Judgment .....	16
E. Plaintiff's Unclean Hands Argument Has No Merit.....	16
F. Retroactively Approving Service Would Be Inappropriate.....	17
G. A Bond is Not Needed .....	18

**TABLE OF CONTENTS (CONT.)**

1		<b>Page</b>
2		
3	<b>III. CONCLUSION.....</b>	<b>19</b>
4		
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		